UNCONSTITUTIONAL LAND DEVELOPMENT CONDITIONS AND THE DEVELOPMENT AGREEMENT SOLUTION: BARGAINING FOR PUBLIC FACILITIES AFTER *NOLLAN* AND *DOLAN*

David L. Callies[†]
Julie A. Tappendorf[††]

INTRODUCTION

Formal agreements between landowners and local government respecting the use of land have increased substantially over the past twenty-five years. Such agreements change the relationship between landowner and government in the land development process from confrontation to some measure of cooperation. While there are several kinds of such agreements (cooperative and housing agreements, for example), only two link vesting land development rights with the dedication and funding of public facilities: the annexation agreement and the development agreement. The principal difference between

[†] Benjamin A. Kudo Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa; A.B., Depauw University; J.D., University of Michigan; LL.M., Nottingham University. I wish to thank Jon Bruce and Jim Ely for their thoughtful comments and suggestions on earlier drafts of this Article, and Michael Thames at Vanderbilt University Law School for his research assistance. This Article is in part (development agreements) a revised version of a chapter, which the authors prepared for an edited collection of essays on land development control techniques entitled TRENDS IN LAND USE LAW (Patricia Salkin ed., forthcoming 2001).

[††] Julie A. Tappendorf is an associate in the Chicago office of the law firm of Holland & Knight LLP. She practices in the Real Estate, Land Use, and Government Group, with a focus on local government and land use law. Ms. Tappendorf received her J.D. from the University of Hawaii's William S. Richardson School of Law and her B.A. from Illinois State University. While attending the William S. Richardson School of Law, Ms. Tappendorf served as an Executive Editor of Research on the University of Hawaii Law Review. She is admitted to the practice of law in the State of Illinois and is a member of the American and Chicago Bar Associations.

the two (which is implied in their names) is that the annexation agreement applies to land about to be annexed to a village, town, city, or other general purpose municipal corporation, as opposed to a development agreement where the land subject to the agreement is already a part of the municipal corporation. Otherwise, both the theory and the principal reasons for negotiating such agreements are, with one exception, the same. The landowner generally wishes to guarantee that local government's land use regulations, conditions, and exactions remain fixed during the life of a prospective land development on the subject parcel. The local government, on the other hand, seeks as many concessions and land development conditions as possible beyond what it could reasonably require through subdivision exactions, impact fees, and other conditions under the normal exercise of its regulatory authority or police power.

The principal difference between the two types of agreement is the benefit/burden of annexing the subject property to the local government's territory under an annexation agreement. The landowner generally obtains a variety of services and protections as a part of the local government's territorial jurisdiction but must subject itself to that local government's land use regulations, as well as property and other taxes. The local government obtains additional tax revenues together with a larger tax base for general obligation borrowing but must provide police, fire, and often utility services to its newly annexed territory. Which side is the most advantaged or disadvantaged depends, of course, on the circumstances of the annexation. A new shopping center, for example, may be more attractive to a local government than a sprawling single-family residential project. Both will require a level of municipal services, but the former will, in all likelihood, generate more revenue (particularly if the local government collects a sales or business tax) and require fewer services like parks and schools.

The purpose of the development agreement, on the other hand, is to vest certain development rights in the landowner/developer in exchange for construction and dedication of public improvements:

> [D]evelopment agreements . . . between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. Unless otherwise provided in the agreement, the rules, regulations, and official policies governing permitted uses, density, design, improvement, and construction are those in effect when the agreement is executed.[1]

---

[1] City of West Hollywood v. Beverly Towers, 805 P.2d 329, 334 n.6 (Cal. 1991). The court continued: "The purpose of . . . the development agreement is to allow a developer who

As it is legally difficult, if not impossible, for the landowner/developer to obtain enforceable assurances that land use regulations will not change during the life of a major land development project—particularly multi-phase development projects extending over many years—and, as there are significant limits to what a local government can exact as a price for permitting land development,[2] both parties, in theory, have adequate reason to negotiate such an agreement. From a contractual perspective, there is adequate consideration flowing to support such a bilateral agreement. This may be particularly important given the frequent use of conditional zoning whereby local government units reclassify property to permit more intense development upon the promise of the developer to limit the number of otherwise permitted uses in the new zone, and to do or provide certain things which are memorialized in one or more unilateral covenants deposited with the local government and recorded. However, such covenants are generally devoid of any mutuality, and local government actions to enforce them have often been unsuccessful.[3] Moreover, the recording of a unilateral covenant by the developer provides little assurance that the local government will maintain the zoning for which the promises contained in the covenants were made. Therefore, a bilateral agreement, particularly one sanctioned by the state through enabling legislation reciting the public purpose behind such agreement, is by far a more legally sound way to proceed.

This Article commences with an overview of the major problems faced by government and landowners solved by the development agreement. The balance of this Article is concerned with the problems—common to both types of agreements—of authority (generally statutory) to enter into such agreements, bargaining away the police power, and permissible subject matter of such agreements. Following a discussion of these fundamental legal issues, this Article continues with a discussion of more particular problems, such as comprehensive plans conformity, character of the agreement (administrative or legislative), and binding of other governmental agencies.

---

needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations." *Id.* at 334-35.

[2] *See* Fred P. Bosselman & Nancy E. Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381 (1985) (describing legal issues posed by "linkage" programs, by which "local regulations . . . condition the approval of certain types of land development on the developer's agreement to contribute to certain other types of development that further particular public purposes").

[3] *See* Russell v. Palos Verdes Properties, 32 Cal. Rptr. 488, 492-93 (Cal. Ct. App. 1963) ("There is no claim that mutually enforceable restrictions were ever created, nor has there been an attempt to enforce any restrictions as covenants running with the land or any rights arising out of the unilateral declaration of restrictions . . . . [T]he unilateral declaration of restrictions . . . failed to create mutually enforceable restrictions . . . .").

I. WHY DEVELOPMENT AGREEMENTS: THE CONSTITUTIONAL CONTEXT

Both developer and local government face substantive constitutional issues in the land development approval process. Local governments are unable to exact dedications of land or fees of the "impact" or "in lieu" variety without establishing a clear connection or nexus between the proposed development and the dedication or fee.[4] The developer is unable to "vest" or guarantee a right to proceed with a project until that project is commenced.[5]

A. Local Government's Problem: Unconstitutional Conditions

In *Nollan v. California Coastal Commission*,[6] the Supreme Court addressed the issue of conditions on land development permissions. Holding that the Commission's requirement of a lateral beach-access dedication was an unconstitutional condition on the issuance of a building permit to reconstruct a beach house, the Court stated:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.[7]

However, the Court concluded that it would be an altogether different matter if an "essential nexus" exists between the condition and the landowner's proposed use of the property:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see

---

[4] *See* Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1017-20 (1987) (describing the "rational nexus" test adopted by a majority of jurisdictions to assess the reasonableness of provisions requiring exactions of property in development agreements, and the expansion of the doctrine governing exactions to address the use of "impact fees"), *reprinted in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 17 (David L. Callies ed., 1996).

[5] *See* John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL'Y 603, 607-08 (2000) (noting that many states require action such as construction or expenditure of funds in reliance on a development permit for the permit to be valid).

[6] 483 U.S. 825 (1987).

[7] *Id.* at 838-39.

> the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. . . .
>
> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them.[8]

In *Dolan v. City of Tigard*,[9] the Supreme Court struck down a municipal building permit condition requiring that the landowner dedicate bike-path and greenway/floodplain easements to the city.[10] As the Court pointed out, had Tigard simply required such dedications, it would be required to pay compensation under the Fifth Amendment.[11] Attaching them as building permit conditions required a more sophisticated analysis, closely following *Nollan*,[12] because the police power is implicated rather than the power of eminent domain. In the process, the Court signaled how far local government may go in passing on the cost of public facilities to landowners. The answer: only to the extent that the required dedication is related both in nature and extent to the impact of the proposed development.

---

[8] *Id.* at 836-37.

[9] 512 U.S. 374 (1994).

[10] *See id.* at 379-80 ("[The City Planning Commission] required that petitioner dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system . . . and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.").

[11] *See id.* at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.").

[12] See generally Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991), for a suggestion on how this decision radically affected the law.

The Court essentially adopted a three-part test: (1) Does the permit condition seek to promote a legitimate state interest? (2) Does an essential nexus exist between the legitimate state interest and the permit condition? and (3) does a required degree of connection exist between the exactions and the projected impact of the development?[13]

The Court disposed of the first two parts quickly and affirmatively. Certainly, the prevention of flooding along the creek and the reduction of traffic in the business district "qualify as the type of legitimate public purposes [the Court has] upheld."[14] Moreover, the Court held it was "equally obvious" that a nexus exists between preventing flooding and limiting development within the creek's floodplain, and that "[t]he same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation . . . [like] a pedestrian/bicycle pathway."[15] So far, so good; the Court found both a public purpose, which the Court assumed without deciding in *Nollan*, and an essential nexus, which the Court decided was lacking in *Nollan*. Regarding the third part of the test, a question remained about whether "the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development."[16]

The Court said no—the city's "tentative findings" concerning increased stormwater flow from the more intensively developed property, together with its statement that such development was "anticipated to generate additional vehicular traffic thereby increasing congestion" on nearby streets, were simply not "constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."[17]

Many courts have applied the nexus/proportionality tests set out in *Nollan* and *Dolan*.[18] The Eighth Circuit in *Christopher Lake Development Co. v. St. Louis County*,[19] for example, applied *Dolan* to strike down a county drainage-system requirement.[20] The county had granted preliminary development approval for two residential communities on the condition that the landowner provide a drainage sys-

---

[13] *See Dolan*, 512 U.S. at 384-86 (describing the analytical structure applicable to impositions of permit conditions upon landowners).

[14] *Id.* at 387 (citing Agins v. City of Tiburon, 447 U.S. 255, 260-62 (1980)).

[15] *Id.*

[16] *Id.* at 388.

[17] *Id.* at 389 (internal quotation marks and citation omitted).

[18] *See* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 567-74 (1999) (discussing several cases applying the nexus/proportionality tests).

[19] 35 F.3d 1269 (8th Cir. 1994).

[20] *See id.* at 1274-75 (reversing the district court's order dismissing the landowner's claims for lack of ripeness).

tem for an entire watershed.[21] The court first addressed part one of the *Dolan* test: whether the condition promoted a legitimate state interest.[22] The court stated that "even assuming the legitimacy of the County's purpose in requiring a drainage system, the application of the Criteria may violate the equal protection clause."[23] Citing *Nollan* for the nexus or second part of the test, the court reasoned that, although "the County's objective to prevent flooding may be rational, it may not be rational to single out the Partnership to provide the entire drainage system."[24] The court concluded that such a requirement was disproportionate to the drainage problems that would be caused by the proposed development:

> [F]rom our review of the record, the County has forced the Partnership to bear a burden that should fairly have been allocated throughout the entire watershed area. "A strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[25]

Regarding a remedy, the court concluded: "We believe that the Partnership is entitled to recoup the portion of its expenditures in excess of its pro rata share and remand to the district court to determine the details and amounts."[26]

B. The Landowner's Problem: Vested Rights

Private-sector need for a mechanism to guarantee the continued applicability of existing (or new) land development regulations to a particular project grew from dissatisfaction with cases deciding the vesting point at which a landowner's right to proceed with a project, legal when conceptualized or commenced, could continue in the face of changed regulations prohibiting such development. Rooted in the concept of nonconformities, this concept of "vested rights" is variously interpreted throughout the United States to provide that developers are guaranteed to proceed with such developments after a simple rezoning at one extreme to only after the issuance of a building permit at the other extreme.[27] It is holdings in the latter category that

---

[21] *See id.* at 1270-71.

[22] *See id.* at 1274 (noting that, because no fundamental right or suspect classification was involved, the government's decision need only be rationally related to a legitimate state interest).

[23] *Id.*

[24] *Id.*

[25] *Id.* at 1275 (quoting Dolan v. City of Tigard, 512 U.S. 374, 396 (1994)).

[26] *Id.*

[27] *See* CHARLES L. SIEMON ET AL., VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS 8-9 (1982) ("The law of vested rights is generally regarded as

prompted vested rights bills to be drafted in two of the thirteen states with full-blown vested rights/development agreements statutes—California and Hawaii.

In California, the first state to pass such a bill, *Avco Community Developers, Inc. v. South Coast Regional Commission*[28] spurred the development community into seeking legislative relief. Despite the expenditure of nearly three million dollars and the rough grading of seventy-four acres, the California Supreme Court ruled that a permit from a newly created agency under new coastal protection statutes was necessary before Avco's rights to continue developing vested. Thus, development rights did not vest until the issuance of a building permit, even though developers incurred substantial costs prior to the issuing of such a permit. Since the passage of the California vested rights statute in 1980, implementation has been rapid. According to one commentator, over half the local governments in California have negotiated nearly 700 agreements since 1980.[29] The development agreement appears to be used by cities of all sizes, and for single-stage and multi-stage projects alike, though predictably the number of such agreements is largest in the larger California cities.[30]

In Hawaii, the second state to pass a development agreements statute (modeled extensively after the California bill), the bill was spawned by *County of Kauai v. Pacific Standard Life Insurance Co.*,[31] colloquially known as the *Nukolii* case after the beach upon which a proposed hotel and condominium apartment building was to be constructed. The Hawaii Supreme Court held that rights to develop did not vest until the last discretionary permit was issued. In this case, that last discretionary permit was the holding of a referendum on the applicable beach zoning, since the petition for the placing of rezoning on the ballot was certified before shoreland management permits—normally the last discretionary permits in the land development process in the County of Kauai at that time—were granted.

II. THE DEVELOPMENT AGREEMENT SOLUTION

The development agreement offers a solution to both landowner/developer and local government. Often authorized by statute to help avoid reserved power and Contract Clause problems discussed below, a well-structured agreement can be drafted to deal with a vari-

---

involving two rules or standards—vested rights or 'vesting' and equitable or 'zoning' estoppel.").

[28] 553 P.2d 546 (Cal. 1976).

[29] *Cf.* Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761, 766 (1993) ("[S]even states have enacted development agreement legislation and . . . hundreds of development agreements have been adopted . . . .").

[30] *Cf. id.*

[31] 653 P.2d 766 (Haw. 1982).

ety of common issues which arise in the land development process between landowner and local government.

A. Bargaining Away the Police Power and Reserved Power

The first issue is whether the local government has bargained away its police power by entering into an agreement under which it promises not to change its land use regulations during the life of the agreement. This issue is resolved in the same way for both annexation and development agreements. Specific statutory authorization is helpful so as to make clear that these agreements effectuate a public purpose recognized by the state. Oddly, while thirteen states have so far adopted legislation enabling local governments to enter into development agreements with landowner/developers,[32] only six states appear to have so authorized annexation agreements.[33] Apparently, the prevalence of statutory annexation provisions, together with a recognition that local governments have the powers they need to exercise their authorized powers (such as annexation), has convinced most courts considering the matter to uphold the annexation agreement in the absence of enabling statutes. An example is California, where a court of appeals held that the statutory sources of a city's authority to discharge its annexation and sewage functions, while not expressly vesting it with the authority to contract for either purpose by means of an annexation agreement, have that effect by necessary implication: "'[A] city has authority to enter into contracts which enable it to carry out its necessary functions, and this applies to powers expressly conferred upon a municipality [and to] powers implied by necessity.'"[34]

---

[32] *See* ARIZ. REV. STAT. ANN. § 9-500.05 (West 1996 & Supp. 2000) (amended 1997); CAL. GOV'T CODE § 65864 (West 1997); COLO. REV. STAT. § 24-68-101 to -106 (2000); FLA. STAT. ANN. § 163.3220 (West 2000); HAW. REV. STAT. § 46-123 (1993); IDAHO CODE § 67-6511A (1995 & Supp. 2000) (amended 1999); LA. REV. STAT. ANN. § 33:4780.22 (West 1988 & Supp. 2000); NEV. REV. STAT. § 278.0201 (1997); N.J. STAT. ANN. § 40:55D-45.2 (West 1991); OR. REV. STAT. § 94.504 (1999) (enacted into law in 1993 by the Legislative Authority but not made a part of the Oregon Revised Statutes until much later); S.C. CODE ANN. § 6-31-10 (Law. Co-op. Supp. 2000); VA. CODE ANN. § 15.2-2303.1 (Michie 1997) (applies only to counties with a population between 10,300 and 11,000 and developments consisting of more than 1000 acres); WASH. REV. CODE ANN. § 36.70B.170 (West 1991 & Supp. 2000).

[33] *See* ARIZ. REV. STAT. ANN. § 9-500.05 (West 1996 & Supp. 2000) (amended 1997); CAL. GOV'T CODE § 65864 (West 1997); 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West 1993); MINN. STAT. ANN. § 414.0325 (West 1987 & Supp. 2001) (amended 1997); N.C. GEN. STAT. § 160A-58.21 (1999); WASH. REV. CODE ANN. § 36.70B.170 (West 1991 & Supp. 2000).

[34] Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (quoting Carruth v. City of Madera, 43 Cal. Rptr. 855, 860 (Cal. Ct. App. 1965)).

1. "Freezing" and the "Contracting Away" Issue

It is black letter law that local governments may not contract away the police power,[35] particularly in the context of zoning decisions.[36] Stated another way, government cannot bind itself to not exercise its police powers. It is thus considered to be against public policy to permit the bargaining of zoning and subdivision regulations for agreements and stipulations on the part of developers to do or refrain from doing certain things. Because land use and development regulations represent exercises of police power, a development or annexation agreement binding a local government not to exercise these regulatory powers arguably violates the reserved powers doctrine,[37] and is, therefore, ultra vires.

Under this doctrine, bargaining away the police power is the equivalent of a current legislature attempting to exercise legislative power reserved to later legislatures.[38] However, an analysis of the cases indicates that what the courts generally inveigh against is such bargaining away forever, or at least for a very long time. The source of the doctrine, *Corporation of the Brick Presbyterian Church v. Mayor of New York*,[39] involved the municipal abrogation of a lease executed over fifty years before. While some later cases do involve invalidation of municipal action just a few years old,[40] the majority

---

[35] *See* Carlino v. Whitpain Investors, 453 A.2d 1385, 1388 (Pa. 1982) (noting that "individuals cannot, by contract, abridge police powers which protect the general welfare and public interest").

[36] *See* Cederberg v. City of Rockford, 291 N.E.2d 249, 251-52 (Ill. App. Ct. 1972) (voiding restrictive covenant and rezoning ordinance because the law "condemns the practice of regulating zoning through agreements or contracts between the zoning authorities and property owners"); Houston Petroleum Co. v. Auto. Prods. Credit Ass'n, 87 A.2d 319, 322 (N.J. 1952) ("Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations."); V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952) ("Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.").

[37] *See, e.g.*, Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for Its Application*, 1 J. LAND USE & ENVTL. L. 451, 464-469 (1985) (discussing the reserved powers doctrine and the inability of local governments to contract away police powers); Bruce M. Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29, 37-45 (1981) (discussing the history and current viability of the reserved powers doctrine in the context of development agreements).

[38] *See* Stone v. Mississippi, 101 U.S. 814, 817-18 (1880) (noting that "no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police"); Corporation of the Brick Presbyterian Church v. Mayor of New York, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826) (noting that local governments have "no power to limit their legislative discretion by covenant"), *discussed in* Kramer, *supra* note 37, at 37-39.

[39] 5 Cow. 538 (N.Y. Sup. Ct. 1826).

[40] *See, e.g.*, Hartnett v. Austin, 93 So. 2d 86, 89-90 (Fla. 1956) (affirming lower court's permanent injunction of a proposed revision of a zoning ordinance that had not yet taken effect); *V. F. Zahodiakin*, 86 A.2d at 131-32 (affirming lower court's invalidation of a decision made

deals with behavior further back in time. The dominant view is that development agreements, drafted to reserve some governmental control over the agreement, do not contract away the police power, but rather constitute a valid present exercise of that power. Good analogous authority exists for the premise.[41]

A subsidiary question under the reserved powers doctrine is whether a city council, in exercising its power to contract, can make a contract that binds its successors? In *Carruth v. City of Madera*,[42] the City contended that obligations under an annexation agreement executed by a predecessor council were invalid because they deprived the successor city council of the power to determine city policy and act in the public interest. The court, however, held that the city was bound, and that a contract was made by the council or other governing body of a municipality and was fair, just, and reasonable at the time of its execution. The court concluded that the contract was neither void nor voidable merely because some of its executory features may operate to bind a successor council.[43]

One of the clearest rejections of the application of reserved power and bargaining away the police power comes from the wide-ranging Nebraska Supreme Court opinion upholding development agreements in *Giger v. City of Omaha*.[44] The objectors to the agreement claimed that development agreements were a form of contract zoning and, therefore, illegal on their face. The Nebraska Supreme Court, however, preferred to characterize such agreements as a form of conditional zoning that actually increased the city's police power, rather than lessened it, by permitting more restrictive zoning (attaching conditions through agreement) than a simple *Euclidean* rezoning to a district in which a variety of uses would be permitted of right.[45]

---

ten years earlier by the local board of adjustment that purported to grant a "variance" from zoning requirements).

[41] *See, e.g.*, Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (holding that the effect of the general rule is to void only a contract which amounts to a city's "surrender" or "abnegation" of its *control* of a properly municipal function, and that the city's reservations of control over the land subject to an annexation agreement, as well as the "just, reasonable, fair and equitable" nature of the agreement, rendered the agreement valid and enforceable against the city).

[42] 43 Cal. Rptr. 855 (Cal. Ct. App. 1965).

[43] *See id.* at 860-61; *see also* Denio v. City of Huntington Beach, 140 P.2d 392, 397 (Cal. 1943) (holding that a "fair, just, and reasonable" contract entered into by a governing body of a municipality "is neither void nor voidable merely because some of its executory features may extend beyond the terms of office of the members of [the governing] body"), *overruled by* Fracasse v. Brent, 494 P.2d 9 (Cal. 1972).

[44] 442 N.W.2d 182 (Neb. 1989).

[45] *See id.* at 192. The court reasoned:

> In sum, we find that there is not clear and satisfactory evidence to support the appellants' contention that the city has bargained away its police power. The evidence clearly shows that the city's police powers are not abridged in any manner and that the agreement is expressly subject to the remedies available to the city under the

Similarly, a recent California appeals court squarely upheld a development agreement that was challenged directly on "surrender of police power" grounds, holding that a "zoning freeze in the Agreement is not . . . a surrender or abnegation [of the police power]."[46] The court held that the freeze advanced the public interest and did not contract away the police power.[47]

Annexation agreement cases are largely in accord.[48] Thus, where a foreign corporation attempted to disconnect its territory from the City of Greenwood Village, Colorado, in part on the ground that the annexation agreement under which the property was first annexed inhibited the city's future zoning power, the federal district court held that "preannexation agreements which impose certain zoning classifications as conditions of annexation have been upheld as valid and enforceable" in Colorado.[49] The court found that Greenwood Village's zoning fell into that category. To the same effect are several state court decisions upholding annexation agreements restricting a local government's power to later change zoning that was granted and guaranteed during the life of the agreement.[50]

> Omaha Municipal Code. Further, we find that the agreement actually enhances the city's regulatory control over the development rather than limiting it.

Id.

[46] Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors, 100 Cal. Rptr. 2d 740, 748 (Cal. Ct. App. 2000).

[47] *See id.* ("[T]he zoning freeze in the Agreement advances the public interest by preserving future options. This type of action . . . is more accurately described as a legitimate exercise of governmental police power in the public interest than as a surrender of police power to a special interest.").

[48] *See, e.g.*, Village of Orland Park v. First Fed. Sav. & Loan Ass'n, 481 N.E.2d 946 (Ill. App. Ct. 1985). In this excellent example from Illinois, a bank attempted to avoid obligations contained in an annexation agreement executed pursuant to the statutory authority contained in that state's preannexation agreement statute. Noting that the bank's cited authority involved agreements which proceeded without statutory authority, the Illinois Appellate Court observed:

> The authorization of preannexation agreements by statute . . . serves to further important governmental purposes, such as the encouragement of expanding urban areas and to do so uniformly, economically, efficiently and fairly, with optimum provisions made for the establishment of land use controls and necessary municipal improvements including streets, water, sewer systems, schools, parks, and similar installations. This approach also discourages fragmentation and proliferation of special districts. Additional positive effects of such agreements include controls over health, sanitation, fire prevention and police protection, which are vital to governing communities.

Id. at 950.

[49] Geralnes B.V. v. City of Greenwood Village, 583 F. Supp. 830, 839 (D. Colo. 1984).

[50] *See, e.g.*, Union Nat'l Bank v. Village of Glenwood, 348 N.E.2d 226 (Ill. App. Ct. 1976) (upholding preannexation agreement requiring single family residential zoning); French v. Village of Lincolnshire, 335 N.E.2d 29 (Ill. App. Ct. 1975) (upholding preannexation agreement that was subject to implied condition that a particular tract of land be used for a public park and zoned accordingly); Mayor of Rockville v. Brookeville Turnpike Constr. Co., 228 A.2d 263 (Md. 1967) (upholding annexation agreement between city and developer that included agreed-upon zoning classification); Beshore v. Town of Bel Air, 206 A.2d 678 (Md. 1965) (upholding annexation agreement that was conditional upon zoning that would allow construction of a shopping center). Moreover, two California superior court cases where devel-

A California case considering a different type of agreement also supports the proposition that agreeing to "freeze" certain land use regulations or agreeing to approve certain land development projects does not constitute bargaining away the police power. In *Stephens v. City of Vista*,[51] the city reneged on a settlement agreement providing for a specific plan and zoning for the subject property and permitting construction at an agreed-upon maximum density. Although the city did rezone the property pursuant to the agreement, it failed to approve a site development plan, in part to force the developer to reduce the development density. The city argued that it had unlawfully contracted away its police power in the agreement. Citing the *Morrison Homes* annexation agreement case,[52] the court held that while a city cannot generally contract away its legislative and governmental functions, the rule applies only where a city surrenders control of its functions.[53] Here, the city could still exercise discretion over the site development process, even though it had guaranteed density and zoning. The court awarded damages based on the difference between the value of the property with 140 units (as permitted in the agreement) and with only fifty-five units (zoning contrary to the settlement agreement), or $727,500.[54]

For a contrary, if somewhat dated, position, see the long dissent by Justice Moore of Colorado in *City of Colorado Springs v. Kitty Hawk Development Co.*[55] Where a corporate subdivision developer sued to recover payment to Colorado Springs for the acquisition of public parks made under an annexation agreement, the majority held that since the developer had obtained water and sewer services for its development under the agreement, as well as annexation to the city, it could not now seek to set aside the agreement. Opining that "the majority opinion amounts to the longest and most dangerous step yet taken by this court in the general direction of emasculation and de-

---

opment agreements figure prominently support their use although the validity of the agreements were not squarely at issue in either case. *See* Lincoln Property Co. v. City of Torrance, No. C607339 (Cal. App. Dep't Super. Ct. Nov. 4, 1986); Continental Dev. Corp. v. Hart, No. C617808 (Cal. App. Dep't Super. Ct. Oct. 21, 1986). The *Lincoln Property* court said, in dicta:

> [I]f the city sought to impose requirements inconsistent or in conflict with the Development Agreement, it would violate rights, possessed by Lincoln, which are both vested and fundamental [but] . . . the rejection of underground parking, the requirement of 'for sale' condominiums and concern about aesthetics and landscaping are not inconsistent or in conflict with the Development Agreement . . . vested rights are not at issue.

Lincoln Property, No. C607339, slip op. at 3.

[51] 994 F.2d 650 (9th Cir. 1993).

[52] Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196 (Cal. Ct. App. 1976).

[53] *See Stephens*, 994 F.2d at 655 ("[T]he rule [that a municipality may not contract away its legislative and governmental functions] applies to void only a contract which amounts to a city's 'surrender,' or 'abnegation,' of its *control* of a properly municipal function.").

[54] *See id.* at 657.

[55] 392 P.2d 467, 473-84 (Colo. 1964) (Moore, J., dissenting).

struction of property rights,"[56] the dissent suggests that annexation agreements cannot require of a landowner that which the city could not constitutionally exact under the police power if the subject territory were already within the city's jurisdiction, even if that exaction is a tradeoff for that which the developer seeks, such as the discretionary annexation of its land. Presumably, the dissent would take the same view concerning such a tradeoff for local government freezing of land development regulations under a development agreement. This is decidedly a minority view today. What informed commentary there has been on the various statutes appears to agree that, especially if there is supporting state legislation, courts should have little difficulty in supporting development agreements and annexation agreements against any reserved powers/bargaining away the police power argument.[57]

In sum, the current application of the reserved powers clause to abrogate government/private contracts has been rare, and courts have attempted to find other grounds to uphold those contracts which are fair, just, reasonable, and advantageous to the local government.[58] It is unlikely that courts will fall back on the reserved powers clause to invalidate development agreements passed pursuant to state statute, especially if the agreements have a fixed termination date and that date is not decades away.[59]

---

[56] *Id.* at 473.

[57] *See* DANIEL J. CURTIN, JR., CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 188-91 (17th ed. 1997); LEAGUE OF CALIFORNIA CITIES, DEVELOPMENT AGREEMENTS §§ 2.1-2.14 (1980) (discussing the possibility that development agreements may "contract away" the police power and citing relevant California cases); DANIEL R. MANDELKER, LAND USE LAW §§ 6.21-6.22 (2d ed. 1988) (discussing statutes and development agreements, and illustrating with California law); 3 C. DALLAS SANDS ET AL., LOCAL GOVERNMENT LAW § 16.55 (1997) (discussing how little trouble courts have found with development agreements and citing cases in support); UNIVERSITY OF CALIFORNIA, DEVELOPMENT AGREEMENTS AND VESTED RIGHTS: AN UPDATE (1983) (collecting commentaries on the history and validity of development agreements); Donald G. Hagman, *Development Agreements*, 3 ZONING & PLAN. L. REP. 65, 73-78 (1980) (discussing the enforceability of development agreements and the "contracting away" of the police power); William G. Holliman, Jr., *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44, 53 (1981) (noting that many California courts have upheld "development agreements in the face of contentions that they were invalid attempts to contract away the legislative power"); Kessler, *supra* note 37, at 469-70 ("If it is a matter of state policy to allow development agreements, the courts are more likely to defer to the legislature's discretion and uphold the agreements against constitutional challenges."); Kramer, *supra* note 37, at 47-51 (criticizing the upholding of such annexation and development agreements).

[58] *See, e.g.*, Carruth v. City of Madera, 43 Cal. Rptr. 855, 860-61 (Cal. Ct. App. 1965) (holding contract entered into by city can be enforced, even if it extends beyond the legislative term, if the contract is fair, just, reasonable, and advantageous to the city); *see also* Kramer, *supra* note 37, at 41 (discussing *Carruth*).

[59] *See, e.g.*, 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West 1993) (restricting the term of any annexation agreement to twenty years).

2. The Contracts Clause and Reserved Powers

It is also arguable that the Contracts Clause of the United States Constitution provides protection for development and annexation agreements in the face of a reserved power challenge: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[60] Although statutorily defined as either a legislative or administrative act, a development agreement will be treated as a contract "when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."[61]

Once the parties enter into a development agreement, strict application of the Contracts Clause would prohibit government from passing any law or regulation that would subsequently impair the resulting contractual obligations. Further, any such act would be unconstitutional, notwithstanding the fact that the new regulation may be required by a genuine health, safety, or welfare crisis. Certainly, this result would not be tolerated, and, therefore, one must conclude that if a development agreement, subject to the Contracts Clause, irrevocably binds government to not exercise its police power in promotion of the public interest, then the agreement violates the reserved powers doctrine and is ultra vires.

The limitation of the Contracts Clause is, however, neither literal nor absolute.[62] The Supreme Court has held that the Contracts Clause limitation cannot operate to eclipse or eliminate "'essential attributes of sovereign power' . . . necessarily reserved by the States to safeguard the welfare of their citizens."[63] The test in *United States Trust Co.*, as refined in *Allied Structural Steel Co. v. Spannus*,[64] ultimately requires a balancing of the exercise of the police power against the impairment resulting from the exercise of such police power. The decisions suggest that any exercise of the police power that impairs any obligations under a development agreement would be subject to strict scrutiny, and, therefore, must be justifiable as an act "reasonable and necessary to serve an important public purpose."[65] Just what constitutes an "important public purpose" sufficient to justify the im-

---

[60] U.S. CONST. art. I, § 10, cl. 1.

[61] United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977). For a full discussion, see Wegner, *supra* note 4, at 995-1003 (making the case that although writers have simply assumed that development agreements are contractual in nature, it would be more correct to characterize development agreements as possessing a hybrid contractual-regulatory nature).

[62] *See* Eric Sigg, *California's Development Agreement Statute*, 15 SW. U. L. REV. 695, 720-22 (1985) (discussing tension between the Contracts Clause and the "reserved powers" doctrine, and describing various tests to determine whether a particular contract surrenders an essential attribute of a state's sovereignty).

[63] *United States Trust Co.*, 431 U.S. at 21 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934)).

[64] 438 U.S. 234 (1978).

[65] *United States Trust Co.*, 431 U.S. at 25.

pairment of contract obligations is a factual determination. In *United States Trust Co.*, bondholders' security interests outweighed the state's interest in pollution control, rapid transit, and resource conservation. Similarly, in *Allied Structural Steel*, the state's interest in protecting its citizens' pensions failed to prevail over a private company's rights in its own pension plan.[66]

B. Statutory Authority: Critical for Development Agreements, Helpful for Annexation Agreements

Courts that condemn zoning by agreement inveigh against the abridgment of powers protecting the general welfare and the "bartering . . . [of] legislative discretion for emoluments that had no bearing on the merits of the requested amendment."[67] This makes statutory authority important, if not critical. Indeed, an Iowa court held that a city's promise to later widen a street and construct a sidewalk amounted to an illegal contract to perform a governmental function in the future.[68] This it could not do without statutory authority. The court opined that the same reasoning would also apply to the city's exercise of its police power.

---

[66] For a thorough discussion of the *United States Trust Co.-Allied Structural Steel Co.* test, see *Anthony v. Kualoa Ranch, Inc.*, 736 P.2d 55 (Haw. 1987), in which the Hawaii Supreme Court applied the Contracts Clause doctrine to strike down a state statute requiring landlords to pay for leasehold improvements, at the tenant's option, as an unconstitutional impairment of contractual rights. *See also* Quality Refrigerated Serv., Inc. v. City of Spencer, 908 F. Supp. 1471 (N.D. Iowa 1995) (granting city's motion to dismiss, in part because plaintiff failed to state a cause of action under the Contract Clause of the U.S. Constitution where it failed to show that city zoning ordinance substantially impaired a contractual relationship, or that legitimate government interests would not justify such an impairment if it existed); Holliman, *supra* note 57, at 52-53 (concluding that "*United States Trust* and *Allied Structural Steel* suggest that any subsequent exercise of the police power which impairs the obligations under a development agreement would be subjected to a strict scrutiny test for reasonableness and necessity"); Kramer, *supra* note 37, at 35 (concluding that "[s]ubsequent legislative action seeking to amend, modify, or repeal [a] development agreement would undoubtedly impair the obligation of the contract and if less onerous alternatives were available to the legislature to achieve the same policy goals they would have to be taken"); Sigg, *supra* note 62, at 720-22 (concluding "it would appear that impairment by a city or county of its own development agreement would have to survive the heightened scrutiny of a 'reasonable and necessary to serve important state purposes' test"). For an exhaustive discussion of the reserved powers doctrine and its applicability to local government contracts (and its Contract Clause limitations), see Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990).

[67] Hedrich v. Village of Niles, 250 N.E.2d 791, 796 (Ill. App. Ct. 1969).

[68] *See* Marco Dev. Corp. v. City of Cedar Falls, 473 N.W.2d 41, 44 (Iowa 1991) (holding that the same limitation that prohibits a legislature from binding successive legislative bodies applies to a legislature's grant to a city, through a home-rule amendment to the state constitution, of "the power to contract for the exercise of its governmental or legislative authority").

1. Protection of General Welfare

The first issue—protection of the general welfare—is probably disposed of by strong public purpose-serving language. California,[69] Florida,[70] and Hawaii[71] all have such language in their development agreement statutes.

---

[69] The California code provides:

The Legislature finds and declares that:

(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

(b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.

(c) The lack of public facilities, including, but not limited to, streets, sewerage, transportation, drinking water, school, and utility facilities, is a serious impediment to the development of new housing. Whenever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities.

CAL. GOV'T CODE § 65864 (West 1997).

[70] The Florida code provides:

(2) The Legislature finds and declares that:

(a) The lack of certainty in the approval of development can result in a waste of economic and land resources, discourage sound capital improvement planning and financing, escalate the cost of housing and development, and discourage commitment to comprehensive planning.

(b) Assurance to a developer that upon receipt of his or her development permit or brownfield designation he or she may proceed in accordance with existing laws and policies, subject to the conditions of a development agreement, strengthens the public planning process, encourages sound capital improvement planning and financing, assists in assuring there are adequate capital facilities for the development, encourages private participation in comprehensive planning, and reduces the economic costs of development.

(3) In conformity with, in furtherance of, and to implement the Local Government Comprehensive Planning and Land Development Regulation Act and the Florida State Comprehensive Planning Act of 1972, it is the intent of the Legislature to encourage a stronger commitment to comprehensive and capital facilities planning, ensure the provision of adequate public facilities for development, encourage the efficient use of resources, and reduce the economic cost of development.

(4) This intent is effected by authorizing local governments to enter into development agreements with developers, subject to the procedures and requirements of ss. 163.3220-163.3243.

FLA. STAT. ANN. § 163.3220 (West 2000).

[71] The Hawaii code provides:

Findings and purpose. The legislature finds that with land use laws taking on refinements that make the development of land complex, time consuming, and requiring advance financial commitments, the development approval process involves the expenditure of considerable sums of money. Generally speaking, the larger the project contemplated, the greater the expenses and the more time involved in complying with the conditions precedent to filing for a building permit.

The lack of certainty in the development approval process can result in a waste of resources, escalate the cost of housing and other development to the con-

2. *Requirements*

As to the bartering away of unrelated (to land use) emoluments, a well-drafted statute generally limits such agreements to specific land use matters, with a catch-all for related matters. Florida's development agreement statute contains such language.[72] What the statutes

---

sumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public.

Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements. Such benefits may be negotiated for in return for the vesting of development rights for a specific period.

Under appropriate circumstances, development agreements could strengthen the public planning process, encourage private and public participation in the comprehensive planning process, reduce the economic cost of development, allow for the orderly planning of public facilities and services and the allocation of cost. As an administrative act, development agreements will provide assurances to the applicant for a particular development project, that upon approval of the project, the applicant may proceed with the project in accordance with all applicable statutes, ordinances, resolutions, rules, and policies in existence at the time the development agreement is executed and that the project will not be restricted or prohibited by the county's subsequent enactment or adoption of laws, ordinances, resolutions, rules, or policies.

Development agreements will encourage the vesting of property rights by protecting such rights from the effect of subsequently enacted county legislation which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project. Development agreements are intended to provide a reasonable certainty as to the lawful requirements that must be met in protecting vested property rights, while maintaining the authority and duty of government to enact and enforce laws which promote the public safety, health, and general welfare of the citizens of our State. The purpose of this part is to provide a means by which an individual may be assured at a specific point in time that having met or having agreed to meet all of the terms and conditions of the development agreement, the individual's rights to develop a property in a certain manner shall be vested.

HAW. REV. STAT. § 46-121 (1993).

[72] The Florida code provides:

(1) A development agreement shall include the following:

(a) A legal description of the land subject to the agreement, and the names of its legal and equitable owners;

(b) The duration of the agreement;

(c) The development uses permitted on the land, including population densities, and building intensities and height;

(d) A description of public facilities that will service the development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development;

(e) A description of any reservation or dedication of land for public purposes;

(f) A description of all local development permits approved or needed to be approved for the development of the land;

(g) A finding that the development permitted or proposed is consistent with the local government's comprehensive plan and land development regulations;

(h) A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety, or welfare of its citizens; and

contemplate is the tradeoff of zoning for development-generated public infrastructure needs (whether or not, it should be added, such public infrastructure needs are generated by the instant development). This is confirmed by cases upholding cooperative and annexation agreements,[73] low-rent housing for zoning,[74] annexation, zoning, and sewer connections for annexation and annexation fees,[75] and redevelopment agreements.[76]

The Hawaii, Florida, Nevada, and California statutes contain minimum standards for describing the basic character of a proposed development subject to a development agreement. These include the size and shape of buildings. In a decision that clearly signals the extent of flexibility possible in California, a California court of appeals recently upheld a development agreement containing no such precise standards.[77] According to the court, it was sufficient that the zoning ordinance contained height and use limitations in the zone where the proposed project was to be constructed.[78]

This section clearly indicates the importance of a well-drafted statute in advancing the legality of the annexation or development agreement, particularly in the face of a reserved powers/bargaining

---

(i) A statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction shall not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, term, or restriction.

(2) A development agreement may provide that the entire development or any phase thereof be commenced or completed within a specific period of time.

FLA. STAT. ANN. § 163.3227 (West 2000).

[73] *See* Housing Redevelopment Auth. v. Jorgensen, 328 N.W.2d 740, 742-43 (Minn. 1983) (holding that cooperation agreement entered into between city and housing and redevelopment authority required city to issue conditional use permits for development of low-income housing project).

[74] *See* Housing Auth. v. City of Los Angeles, 243 P.2d 515, 524 (Cal. 1952) (holding that city was bound by cooperative agreement with housing authority that approved development and construction of low-rent housing project).

[75] *See* Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 201-02 (Cal. Ct. App. 1976) (holding that annexation agreements entered into between city and developer that required city to provide sewage service to planned development were binding and enforceable against the city); Meegan v. Village of Tinley Park, 288 N.E.2d 423, 426 (Ill. 1972) (dismissing developer's mandamus action for issuance of building permit to build a gasoline station pursuant to annexation agreement, because developer failed to seek enforcement of its rights under the annexation agreement within a reasonable time after expiration of annexation agreement's statutory five-year period of validity).

[76] *See* Mayor of Baltimore v. Crane, 352 A.2d 786, 791-92 (Md. 1976) (holding that where developer conveyed strip of property to city for highway purposes under zoning ordinance that allowed developer's proposed development to contain the same density of dwelling units as if the land had not been conveyed, the developer acquired vested contractual rights that were enforceable against the city).

[77] *See* Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors, 100 Cal. Rptr. 2d 740, 743 (Cal. Ct. App. 2000) (upholding development agreement that froze zoning on the proposed development property in exchange for developer's commitment to submit a specific construction plan in compliance with county land use requirements).

[78] *See id.* at 747.

away of the police power challenge. Indeed, there is only one significant case upholding a development agreement against this and other challenges without the benefit of such a statute.[79] It is, therefore, worth noting what other basic provisions are contained in a typical development agreement statute. Thirteen states[80] presently have such statutes. The most detailed comes from Hawaii, and so the citations that follow are primarily to that statute. However, California remains the state in which the vast majority of development agreements appear to be negotiated and are in effect.

C. Common Issues and Problems

1. Enabling Ordinance

A preliminary issue is whether an enabling statute is sufficient to grant local government the authority to enter into development or annexation agreements. There is some authority for requiring a local government to pass an enabling ordinance setting out the details of development agreement/annexation agreement procedures and requirements, although this requirement has, so far, been limited to development agreements rather than annexation agreements. Thus, the Hawaii,[81] California,[82] and Florida[83] statutes appear to require

---

[79] *See* Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989).

[80] *See supra* note 32.

[81] The Hawaii code provides:

General authorization. Any county by ordinance may authorize the executive branch of the county to enter into a development agreement with any person having a legal or equitable interest in real property, for the development of such property in accordance with this part; provided that such an ordinance shall:

(1) Establish procedures and requirements for the consideration of development agreements upon application by or on behalf of persons having a legal or equitable interest in the property, in accordance with this part;

(2) Designate a county executive agency to administer the agreements after such agreements become effective;

(3) Include provisions to require the designated agency to conduct a review of compliance with the terms and conditions of the development agreement, on a periodic basis as established by the development agreement; and

(4) Include provisions establishing reasonable time periods for the review and appeal of modifications of the development agreement.

Negotiating development agreements. The mayor or the designated agency appointed to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements, including negotiating and drafting individual development agreements; provided that the county has adopted an ordinance pursuant to section 46-123.

The final draft of each individual development agreement shall be presented to the county legislative body for approval or modification prior to execution. To be binding on the county, a development agreement must be approved by the county legislative body and executed by the mayor on behalf of the county. County legislative approval shall be by resolution adopted by a majority of the membership of the county legislative body.

HAW. REV. STAT. §§ 46-123 to -124 (1993).

that local governments desiring to negotiate development agreements first pass a local resolution or ordinance to that effect. In Hawaii, the state legislature has delegated the authority to the county to enter into development agreements, provided, however, that the county first passes an enabling ordinance establishing the procedures that the county executive branch must follow.

While the language of the Hawaii statute does not clearly require such an ordinance, three out of Hawaii's four counties have drafted them. According to attorneys in California, those California local governments that have executed development agreements have also passed such ordinances. Indeed, the recent amendments to the California statute—by making it mandatory that local governments pass such ordinances at the request of landowners to ensure that there is a process available for negotiating such agreements—appear to make it very clear that such ordinances are a prerequisite.

2. *Approval and Adoption*

Although one governmental body may enter into the negotiation stage of the development agreement, another may be authorized to approve the final product. In Hawaii, for example, the mayor is the designated negotiator, with the final agreement presented to the county legislative body (city council) for approval. If approved, the city council must then adopt the development agreement by resolution.[84] In California, a development agreement must be approved by ordinance. In Illinois, an annexation agreement may be approved by either resolution or ordinance and must be passed by a vote of two-thirds of the corporate authorities then holding office.[85]

---

[82] *See* CAL. GOV'T CODE § 65865(c) (West 1997) ("Every city, county, or city and county, shall, upon request of an applicant, by resolution or ordinance, establish procedures and requirements for the consideration of development agreements upon application by, or on behalf of, the property owner or other person having a legal or equitable interest in the property.").

[83] *See* FLA. STAT. ANN. § 163.3223 (West 2000) ("Any local government may, *by ordinance*, establish procedures and requirements, as provided in ss. 163.3220-163.3243, to consider and enter into a development agreement with any person having a legal or equitable interest in real property located within its jurisdiction.") (emphasis added).

[84] The Hawaii code provides:

> Negotiating development agreements. The mayor or the designated agency appointed to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements, including negotiating and drafting individual development agreements; provided that the county has adopted an ordinance pursuant to section 46-123.
>
> The final draft of each individual development agreement shall be presented to the county legislative body for approval or modification prior to execution. To be binding on the county, a development agreement must be approved by the county legislative body and executed by the mayor on behalf of the county. County legislative approval shall be by resolution adopted by a majority of the membership of the county legislative body.

HAW. REV. STAT. § 46-124 (1993).

[85] The Illinois code provides:

3. *Conformance to Plans*

Development and annexation agreements must often comply with local government plans as a condition of enforceability, either by statute or because of the rubric that the zoning bargained-for must accord with comprehensive plans. The Hawaii[86] and California[87] development agreement statutes both so require. The importance of the plan is demonstrated by the Idaho Supreme Court in *Sprenger, Grubb & Associates, Inc. v. City of Hailey*.[88] There, the court upheld a rezoning over the objections of the developers of property subject to what the court called a development agreement (arguably an annexation agreement), on the ground that the applicable plan was sufficiently broad in that it supported the contested downzoning.[89] Largely to the same effect is a recent California court of appeals decision where the existence of, and need to conform to, applicable plans, was critical in upholding a development agreement in the face of a broad and direct challenge to such agreements generally.[90]

4. *The Legislative/Administrative Issue*

One of the thorniest problems in land use regulation is whether the amendment or changing of such a regulation is legislative or quasi-judicial/administrative.[91] Legislative decisions like zoning amendments are subject to initative and referendum, whereas quasi-judicial decisions like the granting of a special use permit are not. Legislative decisions like rezonings are, when appealed, usually heard *de novo* whereas quasi-judicial decisions, like the granting of a special use permit, are decided on the record made before the permitting

---

> The annexation agreement or amendment shall be executed by the mayor or president and attested by the clerk of the municipality only after such hearing and upon the adoption of a resolution or ordinance directing such execution, which resolution or ordinance must be passed by a vote of two-thirds of the corporate authorities then holding office.

65 ILL. COMP. STAT. ANN. 5/11-15.1-3 (West 1993).

[86] *See* HAW. REV. STAT. § 46-129 (1993) ("No development agreement shall be entered into unless the county legislative body finds that the provisions of the proposed development agreement are consistent with the county's general plan and any applicable development plan, effective as of the effective date of the development agreement.").

[87] *See* CAL. GOV'T CODE § 65867.5 (West 1997) ("A development agreement is a legislative act which shall be approved by ordinance and is subject to referendum. A development agreement shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan.").

[88] 903 P.2d 741 (Idaho 1995).

[89] *See id.* at 750 ("The Council's conclusion that the 'downzoning' . . . is consistent with Hailey's comprehensive plan is not clearly erroneous, and is affirmed.").

[90] *See supra* notes 77-78 and accompanying text.

[91] *See, e.g.*, Town v. Land Use Comm'n, 524 P.2d 84, 90-91 (Haw. 1974) (holding a reclassification of land by a state land use commission to be quasi-judicial); Fasano v. Board of County Comm'rs, 507 P.2d 23, 26 (Or. 1973) (holding a rezoning to be the same, despite the general rule that such "rezonings" are generally held to be legislative in character).

agency, usually under a state's administrative procedure code.[92] What about the development agreement? On this issue, California and Hawaii appear to differ—in the former, it is a legislative act, [93] whereas it is an administrative act in the latter.[94]

As with zoning, what follows from the statutory declarations—legislative in California, administrative (quasi-judicial?) in Hawaii—is more than a matter of form. Legislative decisions are subject to referendum.[95] Quasi-judicial ones are not.[96] Given the common use of the referendum in both California and Hawaii to address land use issues, development agreements in Hawaii, at least, are likely to be "referendum-proof," as well as protected against government change, during the life of a development agreement. However, California limits the opportunity to repeal a development agreement to thirty days from the date the local government approved the agreement.[97] Thereafter, both the agreement and the proposed land development are immune from subsequent changes by referendum.[98]

Finally, there is the question in California of whether a legislature can declare something to be a legislative act if it is not one anyway, even though this might "take away a right reserved in the California Constitution to the people of a city to rezone by initiative."[99] It is, according to one commentator, the opinion of a "large Orange County law firm" that a development agreement is an adjudicative act, despite the California statutory language.[100] This issue does not arise in Hawaii, both because the state constitution does not so provide, and because the Hawaii statute expresses a preference against

---

[92] *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING CONTROL LAW §§ 531, 533, 538 (1998).

[93] *See supra* note 87.

[94] *See* HAW. REV. STAT. § 46-131 (1993) ("Each development agreement shall be deemed an administrative act of the government body made party to the agreement.").

[95] *See* CAL. GOV'T CODE § 65867.5 (West 1997) ("A development agreement is a legislative act . . . and is subject to referendum.").

[96] *See* DAVID L. CALLIES & ROBERT H. FREILICH, CASES AND MATERIALS ON LAND USE 309 (1986); DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 3.12 (1986).

[97] *See* Midway Orchards v. County of Butte, 269 Cal. Rptr. 796, 804-06 (Cal. Ct. App. 1990) (holding that where development agreements are approved by legislative act of resolution that do not include referendum mechanism, constitutional right to referendum requires thirty-day delay in effectiveness of the agreement to allow for referendum procedure).

[98] *See* CURTIN, *supra* note 57, at 189 ("A development agreement is . . . subject to repeal by referendum. However, the opportunity for such repeal expires 30 days after the city's adoption of . . . the agreement, and thereafter the project is immune to subsequent changes in zoning ordinances and land use regulations . . . inconsistent with those . . . in the agreement.").

[99] Hagman, *supra* note 57, at 70.

[100] *See id.* (discussing law firm's opinion that raises doubt about propriety of a referendum if approval of development agreements is adjudicatory rather than legislative, "since the California Constitution art. IV, § 1 reserves the referendum right to the people only for legislation and it would raise major due process problems if the people were allowed to adjudicate").

such agreements being legislative acts. Other states have decided the question in the courts alone.[101]

5. *Public Hearing*

Another issue arising frequently is whether a public hearing is required before a development agreement can be entered into, and, if so, what proceedings are required. Both Hawaii[102] and California[103] explicitly require that a public hearing be held prior to adoption of the development agreement. The Illinois annexation agreement statute also requires a public hearing.[104]

6. *Binding of State and Federal Agencies*

Hawaii and California diverge on another key point: the binding inclusion of state or federal agencies. Hawaii seeks to bind them;[105] California does not.[106] California initially appears to limit agreements

---

[101] *See, e.g.*, Geralnes B.V. v. City of Greenwood Village, 583 F. Supp. 830, 835 (D. Colo. 1984) (holding that city's zoning actions are quasi-judicial).

[102] *See* HAW. REV. STAT. § 46-128 (1993) ("No development agreement shall be entered into unless a public hearing on the application therefor first shall have been held by the county legislative body.").

[103] The California code provides:

> A public hearing on an application for a development agreement shall be held by the planning agency and by the legislative body. Notice of intention to consider adoption of a development agreement shall be given as provided in Section 65090 and 65091 in addition to any other notice required by law for other actions to be considered concurrently with the development agreement.

CAL. GOV'T CODE § 65867 (West 1997).

[104] The Illinois code provides:

> Any such agreement executed after July 31, 1963 and all amendments of annexation agreements, shall be entered into in the following manner. The corporate authorities shall fix a time for and hold a public hearing upon the proposed annexation agreement or amendment, and shall give notice of the proposed agreement or amendment not more than 30 nor less than 15 days before the date fixed for the hearing. This notice shall be published at least once in one or more newspapers published in the municipality, or, if no newspaper is published therein, then in one or more newspapers with a general circulation within the annexing municipality. After such hearing the agreement or amendment may be modified before execution thereof. The annexation agreement or amendment shall be executed by the mayor or president and attested by the clerk of the municipality only after such hearing and upon the adoption of a resolution or ordinance directing such execution, which resolution or ordinance must be passed by a vote of two-thirds of the corporate authorities then holding office.

65 ILL. COMP. STAT. ANN. 5/11-15.1-3 (West 1993).

[105] The Hawaii code provides:

> In addition to the county and principal, any federal, state, or local government agency or body may be included as a party to the development agreement. If more than one government body is made party to an agreement, the agreement shall specify which agency shall be responsible for the overall administration of the agreement.

HAW. REV. STAT. § 46-126(d) (1993).

[106] The California code provides:

to cities and counties, though it contemplates coastal commissions as parties under certain circumstances. Hawaii, on the other hand, appears determined to include state and federal agencies in development agreements.

7. Amendment or Cancellation of the Agreement

Generally, mutual consent of both parties is needed to amend or cancel the agreement.[107] In Hawaii, if the proposed amendment would substantially alter the original agreement, a public hearing must be held.[108]

8. Breach

The successful negotiation and execution of a development agreement or annexation agreement is generally guided by statute in those states having the benefit of enabling acts. Of considerably greater importance is the issue of breach. There are essentially two kinds of breaches that commonly occur during the period of an agreement: change in land use rules by local government and failure to provide a bargained-for facility, dedication, or hook-up by either party.

a. When Local Government Changes the Land Development Rules

As noted in Part I, the overriding concern of the landowner in negotiating an annexation or development agreement is the vesting of development rights or the freezing of land development regulations during the term of the agreement. Whether these regulations are changed just prior to the execution of the agreement, and whether the landowner may need further permits which are not subject to a particular agreement, raise different, but related, questions. Here, we

---

> A development agreement shall not be applicable to any development project located in an area for which a local coastal program is required to be prepared and certified pursuant to the requirements of Division 20 (commencing with Section 30000) of the Public Resources Code, unless: (1) the required local coastal program has been certified as required by such provisions prior to the date on which the development agreement is entered into, or (2) in the event that the required local coastal program has not been certified, the California Coastal Commission approves such development agreement by formal commission action.

CAL. GOV'T CODE § 65869 (West 1997).

[107] *See* CAL. GOV'T CODE § 65868 (West 1997) ("A development agreement may be amended, or canceled in whole or in part, by mutual consent of the parties to the agreement or their successors in interest . . . ."); HAW. REV. STAT. § 46-130 (1993) ("A development agreement may be amended or canceled, in whole or in part, by mutual consent of the parties to the agreement, or their successors in interest.").

[108] *See* HAW. REV. STAT. § 46-130 (1993) ("[I]f the county determines that a proposed amendment would substantially alter the original development agreement, a public hearing on the amendment shall be held by the county legislative body before it consents to the proposed amendment.").

deal only with the effect on the landowner and the agreement should the local government change development regulations during the term of the agreement. Both development agreement and annexation agreement statutes usually contemplate such a freeze.[109]

Thus, the California Supreme Court, in *City of West Hollywood v. Beverly Towers*,[110] made it abundantly clear in a footnote that landowner protection from development regulation changes is a major factor in executing development agreements:

> Development agreements . . . between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. Unless otherwise provided in the agreement, the rules, regulations, and official policies governing permitted uses, density, design, improvement, and construction are those in effect when the agreement is executed. [111]

The purpose of a development agreement, said the court, was "to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations."[112]

The few courts that have dealt with local government changes in land use regulations have had no difficulty in finding them inapplicable to the property subject to the agreement, provided the agreement itself is binding. Thus, in *Meegan v. Village of Tinley Park*,[113] the Illinois Supreme Court held that the original zoning of the subject property was valid during the term of the annexation agreement and

---

[109] For example, the California code provides:

> Unless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations, and official policies in force at the time of execution of the agreement. A development agreement shall not prevent a city, county, or city and county, in subsequent actions applicable to the property, from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein, nor shall a development agreement prevent a city, county, or city and county from denying or conditionally approving any subsequent development project application on the basis of such existing or new rules, regulations, and policies.

CAL. GOV'T CODE § 65866 (West 1997).

[110] 805 P.2d 329 (Cal. 1991).

[111] *Id.* at 334 n.6. *See also* Daniel J. Curtin, Jr., *Protecting Developers' Permits to Build: Development Agreement in Practice in California and Other States*, 18 ZONING & PLAN. L. REP. 85, 85-92 (1995) (discussing various tests for determining when a developer's rights have vested and local government is estopped "from enacting or applying subsequent zoning changes to prevent the completion of the project or substantially reduce the return upon the developer's investment").

[112] *Beverly Towers*, 805 P.2d at 334-35.

[113] 288 N.E.2d 423 (Ill. 1972).

any change by the Village was void during that time. Indeed, since the Village's attempted zoning change was void, said the court, there was no breach by the Village.[114]

However, Illinois courts have also held that the expiration of an annexation agreement results in the expiration of whatever zoning classification the landowner had bargained for in the agreement. In *Bank of Waukegan v. Village of Vernon Hills*,[115] the landowner sued for the benefits of a zoning classification and special use permit passed and granted under an expired annexation agreement. The court held that the zoning and permits that were enacted the same day as the expired agreement "were provisions of the annexation agreement," and thus only enforceable "during the life of the annexation agreement."[116] The court concluded that any other result would evade the term limits of annexation agreements as set out in the applicable statute. It is not clear how a legislative act of a local government can be so automatically terminated by the expiration of an agreement. Surely the inapplicability of zoning changes in the *Meegan* case, due to the shield provided by the annexation agreement, does not lead to the broad conclusion that any zoning resulting from such an agreement terminates when the agreement does. In attempting to address the inherent problems created by the *Bank of Waukegan* decision, the Illinois General Assembly adopted the following amendatory language in 1995:

> After the effective term of any annexation agreement and unless otherwise provided for within the annexation agreement or an amendment to the annexation agreement, the provisions of any ordinance relating to the zoning of the land that is provided for within the agreement or an amendment to the agreement, shall remain in effect unless modified in accordance with law. This amendatory Act of 1995 is declarative of existing law and shall apply to all annexation agreements.[117]

On the other hand, careful drafting is necessary to avoid the later application of land development regulations of a different sort than those contemplated in the agreement. Thus, in the California case of *Pardee Construction Co. v. City of Camarillo*,[118] the court held appli-

---

[114] *See id.* at 426; *cf.* Cummings v. City of Waterloo, 683 N.E.2d 1222, 1230 (Ill. App. Ct. 1997) (holding the city's amendment to its zoning ordinance that was contrary to the provisions of an annexation agreement was unenforceable against property subject to the annexation agreement).

[115] 626 N.E.2d 245 (Ill. App. Ct. 1993).

[116] *Id.* at 249 (emphasis omitted).

[117] 65 ILL. COMP. STAT. ANN. 5/11-15.1-2 (West Supp. 2000).

[118] 690 P.2d 701 (Cal. 1984).

cable to the subject property a transportation impact fee on the ground that it was different from the land development regulations listed in the agreement as frozen. While this seems to require a certain amount of prescience from the landowner at first blush, a local government can hardly be estopped from exercising its police power in enforcing a new breed of land development regulations that were not contemplated years before by either party, under the exercise of its police power. *Country Meadows West Partnership v. Village of Germantown*[119] represents an entirely different perspective where the court struck down the Village's imposition of a new impact fee against a subdivider, holding that because a subdivision agreement between the Village and the subdivider was approved prior to the enactment of the impact fee ordinance, the subdivider was not obligated to pay the impact fee.

While most development agreement and some annexation agreement statutes either contain a limitation on the duration of such agreements,[120] or provide that the agreement must recite one,[121] many states appear to permit annexation agreements (and some states like Nebraska, development agreements) without the benefit of a statute. It is, therefore, theoretically possible for an annexation agreement to be relatively open-ended with respect to matters such as the zoning of the subject property. The results can be unfortunate for the landowner since it is, of course, black letter law that a landowner has no vested right in a zoning classification absent activity which vests such rights.[122] Thus, where the agreement is silent on the time period, at least one court has held that a landowner is without remedy if, a few years after annexation pursuant to an annexation agreement, the annexing local government changes the zoning to a classification which makes the originally contemplated land development impossible.[123]

---

[119] 614 N.W.2d 498 (Wis. Ct. App. 2000).

[120] *See, e.g.*, 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West 1993) ("The agreement shall be valid and binding for a period of not to exceed 20 years from the date of its execution."); *id.* 5/11-15.1-5 ("Any annexation agreement executed prior to October 1, 1973 . . . is hereby declared valid and enforceable as to such provisions for the effective period of such agreement, or for 20 years from the date of execution thereof, whichever is shorter.").

[121] *See, e.g.*, CAL. GOV'T CODE § 65865.2 (West 1997) ("A development agreement shall specify the duration of the agreement . . . ."); HAW. REV. STAT. § 46-126 (1993) ("A development agreement shall . . . (4) Provide a termination date . . . .").

[122] *See* David L. Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAW. L. REV. 167, 168 (1979) ("While it is fair to say that most jurisdictions are satisfied with an expenditure of funds in reliance upon a preexisting zone classification to support a claim for these so-called vested rights, some jurisdictions have disregarded all together fairly large amounts so expended.") (footnote omitted).

[123] *See* Carty v. City of Ojai, 143 Cal. Rptr. 506, 513 (Cal. Ct. App. 1978) ("The reliance of the Cartys on the conduct of the city in the case before us has most tenuous predicates. No representations were made by any public official from the city as to the length of the time that the zone "C-1" would continue.").

b. Nonperformance of a Bargained-For Act: Dedications, Contributions, and Hook-ups

Equally common is the failure of a landowner or local government to live up to the other terms of the agreement, generally by failing to provide a public facility or money therefor, or by refusing to provide utility services to the subject property.[124] Under such circumstances, the courts have been strict in forcing the parties to live up to their bargains, even when unusual difficulties would appear to render such performance nearly impossible. Thus, in the California case of *Morrison Homes Corp. v. City of Pleasanton*, the court of appeals directed the local government to provide sewer connections to the landowner's property, as agreed in an annexation agreement, even though a superior governmental entity, a state regional water quality control board, ordered the local government not to do so.[125] After deciding that the agreement did not amount to the city's illegally contracting away its police power, the court stated: "The onset of materially changed conditions is not a ground for voiding a municipal contract which was valid when made, nor is the contracting city's failure to have foreseen them."[126]

In much the same vein, the Colorado Supreme Court refused a landowner's request that roughly $25,000 in payments to a local government for acquisition of parks, playgrounds, and schools be returned on the ground that the annexation agreement requiring such payment was ultra vires.[127] The court stated:

> The plaintiff wanted water and sewer services; the City required annexation and a sum of money equal to eight per cent of the appraised value of the property. Each got what it bargained for. . . . We see no reason, legal or moral, why the plaintiff should have all of the benefits of its bargain by which it obtained the water and sewer services it needed in order to carry out its plans, and yet receive back from the City a portion of the consideration which it gave in order to obtain these services . . . .[128]

---

[124] For other items bargained for and litigated, see *Van Cleave v. Village of Seneca*, 519 N.E.2d 63, 64 (Ill. App. Ct. 1988) (exemptions from real estate taxes), and *O'Malley v. Village of Ford Heights*, 633 N.E.2d 848, 849 (Ill. App. Ct. 1994) (exemption from environmental ordinances, which did not survive legal challenge).

[125] 130 Cal. Rptr. 196 (Cal Ct. App. 1976); *but cf.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987) (upholding governmental refusal to perform development agreement when health and safety issue is involved); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593-94 (1962) (same).

[126] *Morrison Homes Corp.*, 130 Cal. Rptr. at 202.

[127] *See* City of Colorado Springs v. Kitty Hawk Dev. Co., 392 P.2d 467, 473 (Colo. 1964).

[128] *Id.* at 472.

Of course, as intimated in the foregoing case, the agreement itself must be binding. Thus, in *Village of Lisle v. Outdoor Advertising Co.*,[129] an Illinois appellate court refused to enforce a local government ordinance banning certain signs and billboards on the property subject to an annexation agreement on the ground that the property was not contiguous to the village and, therefore, the annexation agreement was invalid and unenforceable.

D. Limits on Local Government Conditions, Exactions, and Dedications Pursuant to Annexation and Development Agreements

While every governmental action must be invested with a public purpose, there are few conditions, exactions, or dedications that a local government may not legitimately bargain for in negotiating such agreements. Certainly, local governments may require landowners and developers to make reasonable contributions toward whatever services and other resources the government will need to provide as a result of an annexation or development.[130] But this is so under existing law on development conditions and exactions entirely apart from such agreements.[131] The question is whether the local government may go further since the development or annexation agreement is indeed a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute. So long as the agreement is indeed voluntary, the answer is almost certainly yes.[132] Perhaps the best judicial support for this proposition comes from the Colorado

---

[129] 544 N.E.2d 836 (Ill. App. Ct. 1989).

[130] *See, e.g.*, Village of Orland Park v. First Fed. Sav. & Loan Ass'n, 481 N.E.2d 946, 950 (Ill. App. Ct. 1985) ("Additional positive effects of such agreements include controls over health, sanitation, fire prevention and police protection, which are vital to governing communities.").

[131] *See* David L. Callies, *Exactions, Impact Fees and Other Land Development Conditions*, *in* ZONING AND LAND USE CONTROLS ch. 9 (Eric Damian Kelly ed., 2001); *see also* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the Takings Clause of the Fifth Amendment requires that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987) ("We have long recognized that land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. . . . [A] broad range of governmental purposes and regulations satisfies these requirements.") (internal quotations omitted).

[132] *See* City of Annapolis v. Waterman, 745 A.2d 1000, 1025 (Md. 2000) (conditions agreed to by the subdivider as part of an earlier subdivision agreement were not an unconstitutional taking of the subdivider's property). For a contrary view which would impose the same strict nexus and proportionality requirements upon such agreements as upon "freestanding" local government development dedications, exactions, and other conditions, see generally Sam D. Starritt & John H. McClanahan, *Land-use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After* Dolan v. City of Tigard, *114 S. Ct. 2309 (1994)*, 30 LAND & WATER L. REV. 415 (1995).

Supreme Court.[133] In upholding the levying of a fee as a condition of annexation under an annexation agreement, the court held:

> A municipality is under no legal obligation in the first instance to annex contiguous territory, and may reject a petition for annexation for no reason at all. It follows then that if the municipality elects to accept such territory solely as a matter of its discretion, it may impose such conditions by way of agreement as it sees fit. If the party seeking annexation does not wish to annex under the conditions imposed, he is free to withdraw his petition to annex and remain without the city.[134]

State development agreement legislation enables local governments to enact ordinances providing for development agreements. A fundamental inquiry in determining the legal validity of traditional exaction ordinances concerns the purposes to which the exaction will be put and the relationship of the exaction to the need created by the development. A discussion of the "rational nexus" standard follows, but a collateral issue is raised when determining the municipal authority to extract exactions pursuant to a development agreement.

Courts have developed the "reasonable relationship,"[135] "specifically and uniquely attributable,"[136] and "essential nexus"[137] tests to determine the constitutionality of development exactions. These tests were originally formulated to assess the validity of on-site development exactions. These same tests, however, have been applied to off-site impact fees, are likely to be applied to linkage regulations, and may be relied upon to challenge development agreements. While off-site impact fees and linkage regulations are used to fund improvements necessitated by development in the region as a whole, rather than for needs more directly attributable to the new development, development agreements seeking to extract funds for tenuously related off-site benefits are sufficiently analogous to invite challenge under the same standards.[138] Whether or not development agreements suc-

---

[133] *See* City of Colorado Springs v. Kitty Hawk Development Co., 392 P.2d 467, 472 (Colo. 1964) (holding that the municipality may impose conditions upon an annexation agreement because the action is "purely contractual").

[134] *Id.*; *accord* Sanghvi v. City of Claremont, No. 98-56097, 2000 U.S. App. LEXIS 3196 (9th Cir. Feb. 25, 2000) (affirming dismissal of plaintiffs' claim seeking connection of their residential care facility to sewer system of City of Claremont, because plaintiffs failed to show that they had a right not to have their land annexed as required by *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

[135] *Dolan*, 512 U.S. at 383.

[136] Northern Ill. Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384, 389 (Ill. 1995) (internal quotation marks and citation omitted).

[137] Nollan v. California Coastal Comm'n, 483 U.S. 837 (1987).

[138] *See* John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal"*, 25 URB. LAW. 49, 67 (1993) (noting that courts may be receptive to challenges

cessfully avoid or survive such challenges may depend upon how willing the courts are to accept a return to the underlying "voluntary" rationale.

The argument has been made that exactions agreed to under a voluntary development agreement must bear a rational nexus to the needs created by the development.[139] The argument states that the "rational nexus" and "substantial advancement" standards of *Nollan* are not limited to just those instances where the municipality requires an exaction from an uncooperative landowner, but also apply to voluntary permit conditions. Under this view, the type and extent of exactions permissible under development agreements would not differ from the type and extent available under other traditional exaction mechanisms such as impact fees.

The rationale supporting such a view is that requiring the *Nollan* standard to be satisfied serves to prevent governmental abuse of the mechanism, as it is "difficult to tell whether a landowner's acceptance of a condition is truly voluntary or is instead a submission to government coercion."[140] Thus:

> A municipality could use . . . regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.[141]

The Hawaii development agreement statute provides that, "Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements. Such benefits may be

---

to expenditures that are remote); Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, LAW & CONTEMP. PROBS., Winter 1987, at 69, 82 (concluding that even if Boston's linkage exactions are viewed as regulatory fees, they are vulnerable to being invalidated as not reasonably related to needs created by the regulated development).

[139] *See* Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, *483 U.S. 825 (1987)*, 22 URB. LAW. 23, 27 (1990) ("In applying this standard, courts considered . . . the cost of existing public facilities and their manner of financing, the extent to which existing development has already contributed to the cost of these facilities, and the extent to which the proposed project will contribute to the cost of the existing facilities in the future.").

[140] *Id.* at 46.

[141] Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (upholding statute authorizing municipalities to require dedication of land or payment of fees as condition of subdivision approval as constitutional since enabling legislation and implementing ordinance limited the amount of land to be dedicated to a "reasonable" percentage of the property).

negotiated for in return for the vesting of development rights for a specific period."[142] According to one commentator:

> [T]he government can require the developer to provide public benefits unrelated to the proposed project in exchange for the municipality granting her the right to develop. . . . [T]he statute leads municipalities to believe that the granting of development rights confers a governmental benefit on the developer. This is not the case. *Nollan* clearly holds that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "'governmental benefit."[143]

However, while it is true that the right to develop on one's own land is not a governmental benefit, the right to develop is not the bargaining chip being tendered by the government in a development agreement. The authorities cited in support of the above-quoted argument concern exactions imposed as required conditions to development. In the case of a development agreement, the municipality is not granting the landowner the right to develop nor imposing conditions on such development, but instead is promising to protect the developer's investment by not enforcing any subsequent land use regulation that may burden the project. The developer does not require any such guarantee to exercise his right or privilege to build, and may certainly choose to proceed without it. To the extent that the developer chooses to avail himself of such a guarantee and to negotiate for it, it could be argued that the development agreement does indeed convey a "governmental benefit" upon the developer, since "[i]t is well established that there is no federal Constitutional right to be free from changes in land use laws."[144] The municipality should therefore be free to negotiate its best terms in exchange for the benefit conferred, regardless of nexus.

CONCLUSION

Although the popularity of development agreements has increased considerably in recent years, case law in this area is relatively sparse. The most significant issues addressed by recent courts center around whether a local government has the authority to enter into such an agreement and, if so, what terms and conditions are permissible and constitutional. Development agreements are attractive to both

---

[142] HAW. REV. STAT. § 46-121 (1993).

[143] Crew, *supra* note 139, at 49 (quoting Nollan v. California Coastal Comm'n, 483 U.S. 826, 833 (1987)).

[144] Lakeview Dev. Corp. v. City of South Lake Tahoe, 915 F.2d 1290, 1295 (9th Cir. 1990).

sides of the development equation. On the one hand, a developer can achieve a freeze on development regulations and, in some cases, fees and contributions. A local government, on the other hand, can obtain "voluntary" contributions, dedications, and the developer's agreement to construct public improvements without having to establish any "nexus" between the required improvement or exaction and the proposed development. Provided that the parties entering into the development agreement comply with any applicable statutory procedures, and the terms and conditions of the agreement are not overreaching, a development agreement can be a valuable tool in the development process.